

TANZANIA / JUDGMENT

patrick ngowi 51 others v jehangiry aziz abdulrasool 2023 tzhclandd 17311 12 december 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. LAND APPLICATION NO. 582 OF 2023. (Originating from Land Case No.63 of 2023) PATRICK NGOWI 1^{®^} APPLICANT OBERD LUNYILIKO MGAYA 2[^]" APPLICANT UPENDO ASWILE KARIRO 3^{""} APPLICANT HERMANI SIMON CHILIPWELI 4[^]" APPLICANT FRANK MAKAILA 5[™] APPLICANT FRANK JAYSON MANGIA 6[™] APPLICANT AMOS ARON NGOWI 7[™] APPLICANT ELISONGUO ARON NGOWI 8[™] APPLICANT OMARY KHAMA 9[™] APPLICANT ADAM MRISHO KAMBA 10[™] APPLICANT GASPAR JACKSON MHELELA 11[™] APPLICANT FATUMA KIGAZA 12[™] APPLICANT HAMZA SELEMANI PEMBE 13[™] APPLICANT BEATRICE RICHARD KAPEMBA 14[™] APPLICANT MOHAMED RASHID ALLY 15[™] APPLICANT ISSA OMARY SAID 16[™] APPLICANT GISELA SERELIN KIBENA 17[™] APPLICANT LUKUNDO TUMAINI CHIZELO 18[™] APPLICANT AKWILIN KYANDO 19[™] APPLICANT STELLA ALLY KALINGA 20[™] APPLICANT JUMA ALLY MELETE 21^{®^} APPLICANT TAUSI SELEMAN PEMBE 22[^]" APPLICANT OSWIN GREGORI 23^{'>°} APPLICANT ELIZABETH MICHAEL MAMBO 24[™] APPLICANT MAGRETH MTLA MASHA 25[™] APPLICANT JUMA MIRAJI RAMADHANI 26[™] APPLICANT CHOICE CHRISTOPHER 27[™] APPLICANT WILLHELM HAULE 28[™] APPLICANT DAMIAN DAMIAN MDALANGWILA 29[™] APPLICANT KURUTHUM KAMBI 30[™] APPLICANT BUNGARA HUSSEIN BUNGARA 31^{^^} APPLICANT GEOFFREY MASI 32^{""} APPLICANT DIANA DONATHA PAULO MWAKASEGE 33^{>^i'} APPLICANT STEPHEN PATRIC MUSHI 34[™] APPLICANT YAHAYA ALLY MLAMBALAMBA 35[™] APPLICANT SELEMANI M YANGE 36[™] APPLICANT ASINANI BILALI MGONGO 37[™] APPLICANT NURU ATHUMANI MAPANDA 38[™] APPLICANT IDDY AHAMAD TENGEZA 39[™] APPLICANT ELIAS MSIMBA NKOMA 40[™] APPLICANT RICHARD PINDUA 41^{®^} APPLICANT EBERNEZER KOWELO 42[^]" APPLICANT STANLEY KIPUYO 43^{^°} APPLICANT CASTORY MAGUSU 44[™] APPLICANT ARODIA BEHANYUMA 45[™] APPLICANT RASHIDI KAYANDA SANGA 46[™] APPLICANT NURDIN MPELEMBE 47[™] APPLICANT AMBROSE FAUSTINE KIBUMU 48[™] APPLICANT JOSEPH ROVALDO LYATUU 49[™] APPLICANT RAPHAEL BUNDELE MAYUNGA 50[^]" APPLICANT SIPHORIANA KALINGA 51^{^^} APPLICANT JOYCE SHAID 52^{""^} APPLICANT VERSUS JEHANGIRY AZIZ ABDULRASOOL RESPONDENT

RULING.

Date of last Order 27/11/2023 Date of Ruling 12/12/2023 MWAIPOPO,J. The Applicants have filed an application against the Respondent, herein seeking the following orders;

1. That this Honourable Court be pleased to join the Applicants as Defendants In the Land Case No.63 of 2023 pending at the High Court, Land Division, before Hon. K. Mhina, Judge.
2. Costs of this application be borne by the Respondent. The Application has been brought by way of Chamber Summons supported by the Affidavits of all the 52 Applicants and it is made under Order 1 Rule 3 of the Civil Procedure Code Cap 33 R.E 2019 and any other enabling provisions of the law. In response thereto, the Respondent on the other hand, filed Counter Affidavit deponed by one Victor Mwakimi, an Advocate for the Respondent. The hearing of this application was done through written submissions as per the timetable given by the Court. I am pleased to state that both parties complied with the schedule as directed by the Court. At the commencement of the hearing, the Applicants were represented by Mr. Daimu Kambo learned Advocate while the Respondents enjoyed the services of Mr. Denis Kaaya, learned Advocate. Arguing In support of the Application, the Counsel for the Applicants began by praying to adopt the Applicants Affidavits to form part of their submissions. He then proceeded to submit that the Application has been filed under Order 1 Rule 3 of the Civil Procedure Code Cap 33 R.E 2019 and it arises from Land case No.63 of 2023 where the Respondent is the Plaintiff and has sued 5 Defendants over Plot No. 55 located at Block D Mablbo Industrial area. In his submissions, he drew the attention of the Court to para 9 of the Defendant's Written Statement of Defence in Land Case No.63 of 2023, whereby the Defendants have averred that; "In land dispute No. 91 of 2015 the Plaintiff had filed against we five
(5) only while the suit land had more than 200 people and only our names appeared in the application for execution and not clear about the other 200 people who are In the suit land could be dealt with the judgment. It is the same position that the plaintiff Is now suing in this suit against we 5 only while knowing the status of the suit land as of now that there are more than 200 people. The Plaintiff is put to strict proof as to why has opted to file suit against we five only while knowing well that as of the date of filing this suit, that is, March 2023, there are more than 200 people in this plot". In response to paragraph 9 of the Defendant's Written Statement of Defence in Land Case no.63 of 2023, the Plaintiff has stated that; "That the contents of paragraph 9 of the Defendants Joint Written Statement of Defence are disputed and the Defendants are put to strict proof of the facts thereof. It is further stated that choice of parties by the Plaintiff Is dependent upon the cause of action rather than numbers. The Plaintiff is at liberty to file a suit against any person to whom he believes to have legally claimable rights at any point In time within the time limit prescribed by law". The Counsel further contended that, the Applicants are in plot No.55 Block D Mabibo Industrial area and are among the 200 people referred to in paragraph 9 of the Defendants Written Statement of Defence in Land Case No.63 of 2023. The Respondent In Land Case No. 63 of 2023 has prayed for a number of reliefs /orders including orders for vacant possession,

eviction and demolition of structures erected on Plot No.55 Block D Mabibo Industrial area, therefore the Applicants stand to suffer in the event the orders are granted without the Applicants' participation If they are not joined in Land Case No.63 of 2023. To fortify their case, the Applicants cited the provisions of Order 1 rule 3 of the Civil Procedure Code Cap 33 R.E 2019, which read; "All persons may be joined as a defendant against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly or in the alternative where, if separates suit were brought against such person, any common questions of law or fact would arise. Furthermore, the Counsel for the Applicants has amplified that the Applicants are in Plot No. 55 Block D Mabibo, Industrial area, which is the suit Plot in Land Case No. 63/2023. That the orders sought are for trespass, vacant possession and demolition of structures erected on Plot no. 55 Block D Mabibo Industrial area and that if the respondent was to file a separate suit against the Applicants, a common question of law or facts would arise and the same facts, the same plot and the same relief would arise". The Counsel concluded his submissions by praying to the Court to allow the Applicants to be joined as Defendants in Land Case No.63 of 2023 since their application is meritorious and also meant to prevent duplicity of cases/suits over the same cause of action, same suit plot, same facts and reliefs. He thus concluded that this Application is fit to be allowed. Submitting in rebuttal, the Counsel for the Respondent began by adopting the whole Counter Affidavit of the learned Advocate Victor Mwakimi and its Annexures to form part of his submissions. He then proceeded to submit that; the Respondent is the registered owner of the suit property subject of this Application since 2008. To vindicate his right as the registered owner and finally have peaceful enjoyment over the property, the Respondent filed the suit captioned as Land Case No.63 of 2023 against 5 Defendants who are not parties to this application, seeking for an order of vacant possession against the said Defendants who are trespassers on Plot No.55 located at Block D Mabibo Industrial Area. The Counsel argued that, the application has no substance and it is misconceived with intent to delay mediation since both parties to the substantive matter possess a spirit of settlement. He further amplified that, the Plaintiff is a "dominis //t/s'^that is to say he has a right to choose whom he wishes to sue; the Respondent being the Plaintiff in Land Case No.63 of 2023, is at liberty to choose and file a suit against any other person whom he believes to have legally claimed rights at any point in time within the time limit prescribed by the law. To drive his point home, he cited the case of Mohamedi Masudi Abdalla & Others v Tanzania Road Haulage Ltd in Consolidated Civil Appeal No.150 & 158 of 2019 where the CAT referred the general rule of "dominis litis" which means that; the plaintiff is entitled to choose the person or persons against whom he wishes to sue and the discretion of the Court to add a Defendant or non-party to the suit will only be exercised where it is necessary to do so. The Counsel further asserted that; in terms of Order 1 rule 3 of the Civil Procedure Code cited above, a party seeking the Court to Issue an Order for joinder of parties has to show not only that he has the right to the reliefs sought in relation to the suit but that such reliefs arise out of the same act or transaction and that a common question of law or fact would arise if separate suits were preferred. For easy of reference, he reproduced the provisions of Order 1 Rule 3 of the

Civil Procedure Code Cap 33 R.E which read as follows; "Ail persons may be joined as a defendant against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in alternative where, if separate suits were brought against such persons, any common question of law or fact would arise. The Respondent contended that the above Order 1 Rule 3 of the CPC cited by the Applicants is misconstrued In the instant application, since it would have applied if only the Applicants could establish on the prima facie that they Indeed have the right to any of the reliefs sought to the disputed property. To the contrary, none of the Applicants have attached any documents whatsoever with evidential value to show that they are legal residents over the disputed property located at Plot No. 55, Block D Mablbo Industrial area. He argued further that there is no any survey conducted at the benefit of the Applicants or any Official Search appended or land rent receipts proving that they are owners to warrant them a right to reliefs sought. The counsel argued that, the Applicants do not dispute the question of ownership, which apparently is legally vested to the Respondent, other than non-compensation, however, without justification. The Respondent further argued that, to allow the Applicants to be joined, as Defendants based on the purported allegation is tantamount to creating a vent crisis upon which any person would wish to cheap in resulting in unresolved and unending litigation. Regarding the Applicants' allegations of filing a case against only 5 Defendants while the suit land is purported to have more than 200 people, the Counsel for the Respondent submitted that the Joint Written Statement of the Defendants filed by the Applicants is irrelevant to this Application thus cannot form the basis of the instant Application. The Counsel contended that the parties have no locus stand to rely on the said Written Statement of Defence because they are not the parties to the said case. Thus, the Respondent reiterated the contents of paragraph 3 of the Respondent's Counter Affidavit, which states that the Appiicants are trespassers. Moreover, to avail the Court in deciding whether the application has merit, they have found it significant to bring the following questions for consideration by the Court;

1. Whether joinder of the Applicants will assist the substantive matter to be effectually adjudicated and settle all the questions in the suit.
2. Whether there is any right to relief by the Appiicants apparent on face of records.
3. Whether there is any common question of law arising unless the application is granted. It is their humble submission that none of their raised questions will be answered in favour of the Applicants as the Appiicants allegations are hearsay which none of them has succeeded to substantiate them. In rejoinder, the Applicants reiterated their submissions in chief and objected to the Respondent's submission that the Respondent is the dominis iitis, meaning he is entitled to choose who to sue. The Applicants questioned as to what would happen if the Respondent does not choose to sue a person who the subject matter of the suit /suit property and the person not being sued has an interest in the suit property? They contended that; that is where Order 1 Rule 3 of the Civil Procedure Code comes into play and the need for the Applicants and 200 others to be joined or accommodated in Land Case No.63 of 2023.

They further emphasized that, the Applicants have no other option than seeking leave to be joined since joining the Applicants in Land Case No.63 of 2023 as Defendants will resolve the dispute and bring the suit to rest as opposed to creating a vent of crisis resulting into unresolved chaos and unending litigation as argued by the Respondent. On the issue of the Applicants being not parties to the Land case No 63 of 2023 hence they lack locus standi to refer to the Written Statement of Defence, the Applicants have asserted that, making the use of the Complaint and the Written Statement Defence does not amount to lacking of locus standi to sue. Having considered the rival submissions of the parties, the question to be resolved is whether the Application has merit or whether Applicants herein can be joined as the Defendants in Land Case No.63 of 2023. The Civil Procedure Code Cap 33 R.E 2019 sets out provisions under Order 1 Rule 3, which provide guidance as to who may be joined in a suit as a Plaintiff or a Defendant. The said provisions state that; "All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly or severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise". This position was reiterated in the case of Abdulratif Mohamed Hamisi V Mehboob Yusuph Othman and Another in Civil Revision No.6 of 2017 CAT at Dar es Salaam (unreported) where the Court stated as follows; A necessary party is the one whose absence no effective decree or order can be passed. Thus the determination as to who is a necessary party to a suit would vary from a case to a case depending on the facts and circumstances of the each particular case. Among the relevant factors for such determination include the particulars of the non joinder, the nature of the reliefs claimed as well as whether or not in the absence of the party, an executable decree may be passed. In the Abdulratif case (supra), the Court also made a difference between a necessary party and a proper party/non-necessary party in which a necessary party is necessary in Court for it to effectively and completely adjudicate upon the questions involved in the suit, that is the

12. The Court cannot do so without the necessary party. Thus, the Court of Appeal in the said case underlined two tests to be considered in determining who is the necessary party for purposes of joinder of parties. The Court stated as follows;
 1. There has to be the rights or reliefs against such a party in respect of the matter involved in the suit and
 2. The Court must not be in a position to pass an effective decree in the absence of such a party. Based on the underlined test, I now move to consider the question as to whether it is necessary for the Defendants to be joined in the Land Case No.63 of 2023. Starting with the criteria of the test which is to the effect that; there has to be the rights or reliefs against such a party in respect of the matter involved in the suit. With regard to this requirement, I have perused the Chamber Application supported by the Affidavits and noted that; the Applicants who are 52 in numbers have contended that they seek to be joined in the present case for the reasons that they are in Plot No.55 Block D Labibo Industrial area which is a suit property and are among the 200 people referred to in paragraph 9 of the Defendants Written

Statement of Defence in Land Case No.63 of 2023. Further the Respondent in Land Case No. 63 of 2023 has prayed for a number of reliefs /orders related to vacant 13 possession, eviction and demolition of structures erected on Plot No.55 Block D Mabibo Industrial area, therefore the Applicants stand to suffer in the event the orders are granted without the Applicants' participation If they are not joined in Land Case No.63 of 2023. The Applicants have stated in their Affidavit and submissions that; they are owning houses through residential licences issued to them on the disputed property which is Plot No.55 located at Block D Mabibo industrial area. They have further asserted that the Government ordered the Respondent to compensate them but until now they are yet to be compensated. Further the Government In 2005 continued to issue residential licences to those owning the houses in the disputed area. In response, the Respondent argued that; the Applicants are not the registered legal owners of the Plot in dispute and that Respondent is the registered legal owner of the Plot In dispute hence the Applicants can not be joined as the Defendants In the Land Case No. 63/2023. Based on the facts narrated in their Affidavits and Counter Affidavit, it is clear that parties are in contention on the issues surrounding the suit property and the reliefs sought by the Plaintiff in the main Land Case. While it is not the duty of the Court at this stage to look into the merit of the main land case claims, It is the position of the Court that the I Applicants have presented an arguable or contentious position that they will be affected by the reliefs sought by the Plaintiff in his Complaint if the prayers sought in the Complaint would be granted by the Court and further that they are entitled to the reliefs in the disputed property where they are currently residing. They further contended that, among the 200 hundred people mentioned in the Written Statement of Defence, are the Five Defendants, who are currently being sued in Land case no. 63/2023 and have also alerted them about the pending Land Case. Further the Applicants in their Application have also attached some correspondences regarding the issue of pending compensation to be paid to them by the Respondent as directed by the Government. It is my position that all these issues will need to be resolved in the main case before the Court finally determines the Land Case no. 63/2023 and proceed to grant the orders or reliefs sought in the Complaint. In his submissions, the Counsel for the Respondent contended that, the Plaintiff is dominus litis, citing the case of Mohamed Masoud Abdalla Versus Tanzania Road Haulage (1980) LTD, Consolidated Civil Appeal Nos 150 & 158 of 2019, CAT, 2019, DSM. I have perused the said case and noted that; the Court of Appeal in that case asserted that t general rule or principle, however it also made it clear that; It has discretion to add a person not originally part to the suit in order to effectualiy and completely adjudicate and settle ail the questions in the suit. See also the case of Tanga Gas Distributors Ltd Vs. Mohamed Salim Said &2 others, Civil Revision No. 68 of 2011 (unreported) where the Court stated on page 31 as follows; For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions involved in the suit; one of the two things has to be shown. Either it has to be shown that the orders which the Plaintiff seeks in the suit would legally affect the interest of that person and it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the Court in that suit. Alternatively a person qualifies (on application of defendant) to be joined as a co defendant, where it is

shown that the Defendant can not effectually set up a defence he desires to set up unless that person is joined in it or unless the order to be made is to bind that person (see Mulla...14 ed..) Volume 11 para 858 and 864- t 5 and Amon v Raphael Tuck and Sons Ltd... m

Furthermore, in the case of Payne V. British Time Recorder (192) All ER 388 In which Scrutton J stated at page 393 that; Broadly speaking, where claim by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the court will allow the joinder of defendants subject to its discretion as to how the action should be tried. Therefore based on the above cited quotations of the cases, a person can be joined as a Defendant in the case, if firstly, there are common questions of law or facts will be involved, secondly, his presence in the suit is necessary for effectual and complete disposal and settlement of all questions involved in the suit, thirdly, if the orders which the Plaintiff seeks in the suit would legally affect the interest of that person and it is desirable for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit and fourthly, that the order to be made will bind that person. Since the Applicants have alleged to be residing in the suit area, then the orders for vacant possession, eviction, e.tc. sought by the Plaintiff will have an impact on them in the same or common manner alleged for the other defendants if the Plaintiff wins the case. Therefore, their involvement in the matter is not only important for the efficient disposal and settlement of all the issues in the main matter but will also assist the Court to pass an executable order or Decree. Moving to the second criteria of the test, that is, the Court must not be in a position to pass an effective decree in the absence of such a party, I am of the position that this Court has noted that, based on the averments in the Affidavit, the Applicants have stated that they are staying in the land in dispute hence it will be difficult to execute the decree of the Court effectively In the event the Plaintiff/Respondent wins his case (Land case no 63/2023 and such a situation will result into unresolved chaos and unending litigation If the Defendants will not be joined. It follows therefore that both tests are of importance to be met. The second criteria are also affirmed in the case of Tanga Gas Distributors (supra), as cited in the quotation above. That since the Applicants have alleged to be staying in the disputed land and to be issued with residential licences in respect of the suit areas, it is my firm position that they are not supposed to be left out in the institution of the suit, since the Decree can have an impact on them and the same cannot be effectively passed without them being joined and be given the right to be heard. In the case of Sikujua John versus Helena Salitiel @Herena Luhuya Msanigwa and 2 others Land case no. 2/2022, HCT Kigoma the Court affirmed the right of a party to be heard before an adverse action or decision is taken against such a party. Furthermore, as argued by the counsel for the Respondent that as a general rule It is a trite law that a person has a right to choose who to sue 'dominus litis' however, the same has exceptions. In the case of Farida Mbaraka & Farid Ahmed Mbaraka V Domina Kagaruki, Civil Appeal No.136 of 2006 (unreported) the Court of Appeal at page 7 stated that; "Needless to say, the Respondent is the dominus litis and she is the master of the suit. She cannot be compelled to litigate against someone she does not wish to implead and against whom she

does not wish to claim a relief, however it is abundantly clear to us that the Tanzania Building Agency who purportedly sold the disputed property to the respondent cannot be left out of the picture". In the present case as explained above the Applicants cannot be left out In the case, they must be joined as Defendants or parties without which the order cannot be effectively executed In their absence. Similarly, In the event the Plaintiff wins the case he would not be able to effectually exercise his claimed right or authority over the suit property as long as these Applicants would still be residing in the disputed area and have shown their interest to contest the matter. Under such circumstances this Court could be said to have completely and effectually settled all the questions involved In the suit. This could only be done after making an order binding on all the persons who are interested in the suit property or have an Interest to protect in the suit property and would be affected by the order. Similarly, It would also be desirable for the avoidance of multiplicity of suits to have such persons joined In terms of Order 1 Rule 3 of the CPC RE 2019, so that the Applicants could also be bound by the decision of the Court in the suit concerned, depending on the outcome. For the foregoing reasons, and in the upshot, I order that the 1^ -52"" Applicants be joined in the suit as necessary parties and the Pleadings be amended accordingly. The application is allowed. Costs to follow the event. FoUKT 02 S .D. MWAIPOPO, 4* V- JUDGE, tj 12/12/2023 The Ruling delivered this 12"^ day of December, 2023 in the presence of Learned Daimu Kambo for the Applicants and learned Advocate Dennis Mtangi for the Respondent, is hereby certified as a true copy of the original. ^kXUJpCp^ > o S.D. MWAIPOPO t JUDGE 2^ 12/12/2023 ^oivvs^

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